No. 91-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION; BLACKFEET TRIBAL BUSINESS COUNCIL; BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD PERSON, CHAIRMAN; ARCHIE ST. GODARD, VICE CHAIRMAN; MARVIN WEATHERWAX, SECRETARY; ELOUISE C. COBELL, TREASURER

and

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL TAX COMMISSION ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION; KENNETH E. RYAN, TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/ACCOUNTANT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR RESERVATION TELEPHONE COOPERATIVE AND BRIEF FOR RESERVATION TELEPHONE COOPERATIVE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF FOR RESERVATION TELEPHONE COOPERATIVE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Reservation Telephone Cooperative respectfully moves this Court, pursuant to Rule 37.2 of the Rules of the United States Supreme Court, for leave to file the attached *amicus curiae* brief in support of the petition for

a writ of certiorari. *Amicus* Reservation Telephone Cooperative sought and obtained the consent of petitioner Burlington Northern Railroad Company. However, on October 25, 1991, when counsel for respondent Fort Peck and counsel for respondent Blackfeet Tribe were requested to give their consent, they conditioned their consent on receipt of the attached brief one week prior to the filing date. Because the time for filing was less than one week away, it was impossible to comply with such a condition.

Amicus Reservation Telephone Cooperative is vitally interested in this case because it operates a telephone cooperative within the original boundaries of the Fort Berthold Indian Reservation and is potentially subject to the imposition of Fort Berthold Tribal taxes scheduled to take effect January 1, 1992. Unlike petitioner, which is self described as a captive non-resident, non-member, *amicus* Reservation Telephone Cooperative is a long-standing, permanent resident, non-member entity facing taxation of its trust and fee land interests now within the limits of the reservation, as the Blackfeet ordinance would tax fee interests. *Amicus* Reservation Telephone Cooperative is required to provide reservation service to everyone who requests telephone service. The issue involved in this case—the nature and extent of Indian Tribal taxing power over non-members of the tribe—has far-reaching ramifications for all non-members who engage in on-reservation activities and/or live within reservation boundaries. Fortified with the assistance and encouragement of the United States, tribal governments across the nation have proposed or enacted ordinances to tax non-member interests within the limits of Indian reservations. Such tribal taxing ordinances are based on a misplaced understanding of earlier opinions of this Court addressing limited and special transactions occurring on tribal trust land. These tribal ordinances seek to tax vital interests on rights-of-way and other fee land interests of non-members.

The taxation involved here is taxation without consent, taxation without representation, taxation without limitation, and taxation without recourse to state or federal court. The ramifications of such taxation significantly impact entities such as *amicus* Reservation Telephone Cooperative, as well as other businesses and individuals within the limits of Indian reservations.

A critical examination of the ramifications of tribal taxing authority over non-members is crucial to a well-reasoned decision on the petition for a writ of certiorari. As *amicus curiae*, Reservation Telephone Cooperative seeks to bring before this Court fundamental considerations involving the nature and extent of tribal taxing power, specifically over fee interests involving both non-resident and resident non-members. *See* attached brief. These considerations, while directly applicable to the instant case, transcend the specific circumstances of the petitioner and thus are not necesasrily all addressed by petitioner. For the foregoing reasons, Reservation Telephone Cooperative respectfully requests that its motion for leave to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari be granted.

Dated this 1st day of November, 1991

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BRIEF FOR RESERVATION TELEPHONE COOPERATIVE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The concern that prompts the filing of this Brief can be simply stated. Tribal governments across the country, with the assistance and encouragement of the United States, have proposed or enacted ordinances to tax non-member interests within the limits of Indian reservations similar to the ordinances now before this Court. Almost without exception, these tribal ordinances are premised upon an unwarranted and sweeping extension of several opinions of this Court addressing limited and special transactions on tribal trust land, so as to generally tax other interests on rights-of-way and other *fee land* interests of non-members, as the Blackfeet ordinance would tax fee interests. Advancing the tribal territorial sovereignty argument of its constituent agencies, the United States has specifically endorsed this position regarding the taxation of these and other fee land interests and told the court of appeals: "[E]ven without a direct property interest in the land . . . services, costs, and advantages provide an *independently sufficient nexus* for the tribal tax. . ." Brief for the United States at 11, *Burlington Northern Railroad v. Fort Peck Tribal Executive Bd.*, 924 F.2d 899 (9th Cir. 1991) (emphasis added).

Armed with this support from the United States, which is not likely to be modified in the foreseeable future, at least in the absence of a controlling opinion from this Court, it is fair to assume that even those tribes that have not yet adopted a similar position, will quickly follow suit. As the tribal attorney explained:

> If the Tribal Business Council, chooses to incorporate agriculture into the tax code, the Council will be well within their legal authority to do so. If the Tribal Business Council chooses to exempt fee lands for the first (1st) year tax year, the Council may create this exemption or it may not . . . The Tribal Business Council recognizes that chief among its

> powers of sovereignty is the power of taxation, which may be exercised over members of the Tribe and over non-members. . . .

Memorandum from Patricia Diane Johnson, Staff Attorney, Three Affiliated Tribes of the Fort Berthold Reservation (May 31, 1991), App. B at 16a.

Only a serious misreading of the decisions of this Court could lead to the conclusion that a tribal government can tax property that it undeniably cannot zone. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Yet this is the predominant view within the limits of Indian reservations today.

As a result, what is essentially at issue here is taxation without consent, taxation without representation, taxation without limitation, and taxation without recourse to state or federal court. The very nature of this seemingly unbridled discretion promises devastating consequences for businesses and others similarly situated within the limits of Indian reservations, such as *amicus* Reservation Telephone Cooperative.

Amicus Reservation Telephone Cooperative is a small, successful, telephone cooperative in rural North Dakota. A brief history of this area is set forth in *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972), and need not be repeated here. For our purposes, it is sufficient to note that the amount of fee land and nonmember settlement in the original Fort Berthold Reservation is long standing and substantial. There are a number of small towns, including the City of Parshall, North Dakota, where the Corporate office for *amicus* Reservation Telephone Cooperative is located. For half a century, until 1971, this area "as a matter of general practice" was not "treated as belonging on the reservation" *City of New Town*, 454 F.2d at 123. Despite this fact, *City of New Town* resolved that issue in favor of the reestablishment of the original reservation boun-

daries.[1] As a result, some of the previous homestead and other policies of the United States described in *Montana v. United States*, 450 U.S. 544 (1981), regarding settlement of Indian reservation, policies which created justifiable expectations, have been turned on their head.

In any event, although the exact date of the beginning of telephone service is not known, by 1951 several individual companies and area residents decided to form a rural telephone cooperative. Articles of Incorporation were filed in North Dakota on October 16, 1951, a number of additional existing companies were later purchased, and service has been expanded and continued to be improved throughout the reservation and beyond since that time. Today, *amicus* Reservation Telephone Cooperative operates over a thousand miles of lines with rights-of-way, as one would expect, crossing both trust and fee property. Congress authorized the Secretary of the Interior nearly a century ago to grant these rights of way in the nature of an easement. *See* discussion *infra*. The Cooperative serves 4,210 subscribers, including both members and non-members of the Three Affiliated Tribes. Previously designated as "beneficial rights-of-way" and processed without access fees or damages, the rights-of-way across tribal trust land were, as recently as 1985, deemed to provide a "much needed service" for the "benefit of members of the Three Affiliated Tribes", according to a tribal resolution. App. E at 23a.

In this respect, this history of *amicus* Reservation Telephone Cooperative is not unlike that of other cooperatives and businesses located throughout the area. Several rural electrical cooperatives track the same development and today serve the resident population with

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[1] *See also Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and *DeCoteau v. District County Court*, 420 U.S. 425 (1975). To the extent that *City of New Town* predated *DeCoteau* and *Rosebud*, see *Puyallup Tribe, Inc. v. Dep't. of Game of Washington*, 433 U.S. 165, 173 n.11 (1977).

lines and rights-of-way that cross trust and fee lands. Other companies, such as pipeline companies, are of a more recent origin but have also made extensive commitments. Even some independent oil companies that operate solely on fee land are now threatened by tribal severance taxes. Others with operations on both fee and trust lands are faced with similar problems. In addition, the one railroad which the area is fortunate enough to have still in service (the Soo Line) is now in jeopardy, even though its rights-of-way are almost entirely on fee land.[2]

Earlier this year, *amicus* Reservation Telephone Cooperative and other affected businesses situated in this area of North Dakota were publicly notified that the Three Affiliated Tribes had adopted a Possessory Interest Tax. Shortly thereafter, copies of the tribal tax code and other information were distributed for comments at a public hearing. After this hearing, and despite objections, the tribal business committee decided:

> To tax those oil, gas, utility and railroad activities located on the *entire* reservation, including any facilities and lines of those entities to be taxed which are located upon *fee lands*, which is their [i.e. the tribal business committee's] *right*.

Letter from Tom Needham, Asst. Exec. Dir., Three Affiliated Tribes Tax Commission (June 24, 1991), App. C at 19a (emphasis added).

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[2] Petitioner noted some of the tribal taxes that have recently surfaced across the country. Other representative examples of similar tribal taxes proposed or enacted include a tax on agriculture and other fee lands (Idaho); a possessory interest tax on rights-of-way (Washington); a discriminatory after-the-fact surcharge limited to non-member lessees (South Dakota and North Dakota); a Business Licensing Tax (with a penalty that authorizes an order "directing the police to remove the non-member physically from the Reservation") applicable to a non-member populated and settled area comparable to *Brendale* which requires consent to the jurisdiction of the tribal court (North Dakota and South Dakota); a doubling of lease fees limited to non-member lessees (South Dakota); and numerous other non-member business taxes.

Although the tax formula is less than exact, one thing is clear: the tax is substantial. The value of the land was "set" at twenty eight hundred dollars ($2800.00) per acre (many times the fair market value), the result of a factor stated to be "fifty percent" of the cost for a company to "go around" the reservation. Letter from Tom Needham, Asst. Exec. Dir., Three Affiliated Tribes Tax Commission, (June 24, 1991), App. C at 20a. As recently as October 17, 1991, *amicus* Reservation Telephone Cooperative was notified that the formula had been modified again, additional exemptions were said to be adopted and the effective date of the tax was postponed until January 1, 1992—but even this uncertainty, although not atypical, is only a small part of the problem. App. A at 1a.

Subsequent to the decision below, the Ninth Circuit Court of Appeals further complicated the entire process by now requiring opponents of this or similar tribal ordinances to exhaust all remedies in tribal court prior to filing for relief in federal court. *Burlington Northern Railroad v. Crow Tribal Council, et al.*, 940 F.2d 1239 (9th Cir. 1991).[3] As a result, the addition of onerous escrow requirements, coupled with a virtually unlimited tribal appeal process that sometimes goes on for years, squarely places the tribal tax issue before this Court in a position of such importance as to be worthy of immediate consideration.

The Indian Civil Rights Act has not transformed Indian reservations into the bastions of fundamental fairness that the United States would have this Court envision. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 82 (1978) (White, J., dissenting) (1978). In point of fact, for at least four decades, the concern in Congress over the lack of fundamental fairness in Indian country, has focused on the actions of tribal governments, not

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[3] This holding is in direct conflict with the decision below, which the Ninth Circuit did not even cite. Pet. App. at 1a.

State governments. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), *Bryan v. Itasca County*, 426 U.S. 373 (1976) and *Santa Clara Pueblo*, 436 U.S. 49. Most recently, this concern surfaced in the context of a 1988 Report from the United States Department of Justice, Office of Legislative and Intergovernmental Affairs. App. G. This ten page federal report describes the situation on reservations as "crucial" and concludes that unless remedied,

> individual rights guaranteed by Congress will remain a largely unfulfilled promise; one which continues to protect individual rights in *theory* but not in *practice*.

App. G at 29a (emphasis added). The remedy, S. 517, was introduced on March 6, 1989, by Senator Orrin Hatch, to expressly provide for federal court review. 135 Cong. Rec. 23 (1989). *Amicus* Reservation Telephone Cooperative can add nothing to emphasize the concern reflected in the pages of the Congressional Record dealing with the introduction of this legislation. *See* App. H. Opposition by Tribal governments has continued to block legislative efforts on this issue to date.

Moreover the last word from Congress specifically addressed to the construction, operation, and maintenance of telephone lines for general telephone business through any Indian reservation is relevant. *Amicus* Reservation Telephone Cooperative, like the petitioner, obtained its rights-of-way from the federal government. Significantly, the relevant statute, enacted nearly a century ago, seems to preclude tribal taxes. It provides, in part:

> The Secretary of the Interior is authorized and empowered to grant a right of way, in the nature of an easement for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation. . . .

> The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding $5 for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this section; *Provided*, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be construed as to deny the right of municipal taxation in such towns and cities.

Act of March 3, 1901, ch. 832, 31 Stat. 1058, 1083 (1901) (codified at 25 U.S.C. § 319 (1988)). App. F. *See* 25 C.F.R. § 169.26 (1991). At the very least, this language forecloses any argument that Congress intended in some essential (yet unspoken) manner to sanction an additional tribal tax burden.

Amicus Reservation Telephone Cooperative does not doubt tribal governments can find a use for any amount of revenue raised by taxes of this nature—but that, too, is beside the point. Proponents of tribal territorial sovereignty have frequently reminded this Court of the ex-

tensive fiduciary duties and other obligations owed Indian tribes by the United States. In this instance, however, the proposed tax would result in placing this national obligation on a captive few. *Amicus* Reservation Telephone Cooperative would submit that everyone in the United States would be better served if the government simply lived up to that national commitment, whatever it is, at the expense of all taxpayers. Stretching the decisions of this Court to cover situations clearly not intended, so that an unfortunate few will be forced to unjustifiably bear whatever burden the United States owes Indian tribes and whatever else Indian tribes deem appropriate is not a viable solution.

This is especially so in light of our final point. *Amicus* Reservation Telephone Cooperative would submit that it would be difficult to intentionally devise a scheme more destructive of present and future reservation economic development, more certain to insure that poverty already prevalent will only get worse, and more acrimonious and divisive for members and non-members alike, than that presented here. Correspondence from the Tax Commission of the Three Affiliated Tribes makes clear the reality of the situation. After granting an extension requested for the submission of certain information in connection with the proposed tax, the Executive Director of the Tax Commission stated:

> In addition, *due to the cancellation of projects planned for the reservation by the companies which may become subject to the Possessory Interest Tax*, no other extension will be deemed warranted. . .

Letter from Joseph J. Walker, Exec. Dir., Three Affiliated Tribes Tax Commission (Aug. 8, 1991), App. D. at 22 (emphasis added).[4]

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[4] The Counties and Cities in these reservation areas are statistically among the poorest in the Nation. In some instances, the negative implications of tribal taxation will unquestionably cripple, if

All of which makes the remark of Justice Holmes more appropriate than ever: "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

SUMMARY OF ARGUMENT

Tribal governments across the country, with the assistance and encouragement of the United States, have proposed or enacted ordinances to tax non-member interests on rights-of-way on trust and fee lands within the limits of Indian reservations similar to the ordinances now before this Court. These tribal ordinances are premised upon an unwarranted and sweeping extension of several opinions of this Court addressing limited and special transactions on tribal trust land. The very nature of this seemingly unbridled discretion promises devastating consequences for businesses and others similarly situated within the limits of Indian reservations, such as *amicus* Reservation Telephone Cooperative.

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not destroy, this already limited tax base (a tax base undermined each month by the almost wholesale conversion of fee land to trust land and by other exemptions and entanblements). *See* merits briefs in support of petitioners-cross respondents in *Confederated Tribes of the Yakima Nation v. County of Yakima*, Nos. 90-408, 90-577.

ARGUMENT

> "Generalizations on this subject have become particularly treacherous".

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

This statement from *Mescalero* is most appropriately remembered here. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court was presented with a reservation situation *atypical* in three important respects. First, title to the entire reservation was actually held in trust by the United States for the Jicarilla Apache Tribe. *Merrion*, 455 U.S. at 133. Second, the activity taxed was "the extraction of *vital* and *depletable* resources from trust lands" "intimately associated with the Indian land situs and significant tribal interest". Brief for the Secretary of the Interior at 5, *Merrion*, 455 U.S. 130 (emphasis added). Finally, at least some type of formal business relationship was unquestionably evidenced by mineral leases approved by the United States. Thus, even according to the United States, there was "no occasion" in *Merrion* for the Court to "consider" tribal taxation in any context other than this "because the leases involved are for the extraction of oil and gas on *tribal lands*." Brief for the Secretary of the Interior at 9, n.1, *Merrion*, 455 U.S. 130 (emphasis added). For the most part, the opinion of the Court in *Merrion* reflects this understanding, but the opinion of the court of appeals here does not. This is the crux of the problem. In context, consent is important and the facts are important. Generalizations and absolutes are of little help in resolving questions of this nature. Easements and rights-of-way on trust or fee land or mere ownership of fee lands within the limits of Indian reservations all present radically different fact situations, far removed from the holding of *Merrion*.

In *Brendale*, the plurality opinion said the same thing in another way. In reviewing the second exception in

Montana, Justice White noted that it was "significant" that the so called second *Montana* exception was prefaced by the word "*may*" which meant it "depends on the circumstances". *Brendale*, 492 U.S. at 428-29 (emphasis as in original). *Amicus* Reservation Telephone Cooperative would note that the first *Montana* exception expressly dealing with taxation is also prefaced by the word "may" and that here too, it should also mean that it "depends on the circumstances" for the same reason as in *Brendale*. The extent of these differing circumstances within limits of an Indian reservation can best be pictured by reference to a single statement of this Court in *Duro v. Reina*:

> Indeed, the population of non-Indians on reservations generally is greater than the population of all Indians, both members and nonmembers.

Duro v. Reina, 110 S. Ct. 2053, 2065 (1990).

With that said, we start at the beginning with this Court's decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Even the date of that beginning is telling. Other than *Morris v. Hitchcock*, 194 U.S. 384 (1904), which is clearly distinguishable, it is somewhat surprising, to say the least, that the question of tribal taxation of non-members was not even an issue squarely addressed by this Court until 1982. It is for this reason, and not because of the actual holding of the majority in *Merrion*, that consideration should at least begin with a review of the history set forth in the dissenting opinion of Justice Stevens, the most extensively documented discussion of this question to date. *Merrion*, 455 U.S. at 160 (Stevens, J., dissenting).

Assuming that review, we stress here one major point that has since proven true. Irrespective of whether everyone would agree, as we do, with the dissent's suggestion that the majority in *Merrion* did not give adequate "attention to the critical difference between a tribe's powers over its own members and its power over

nonmembers," the Court has twice revisited the issue in much more detail and placed primary emphasis on that disinction. *Id. See Brendale*, 492 U.S. 408 (1989); *Duro*, 110 S. Ct. 2053 (1990). The opinion of Justice Blackmun in *Brendale* retraces and underscores, step by step, the consequence of that process to that date. *Brendale*, 492 U.S. at 488 (Blackmun, J., concurring and dissenting).

This evolution of the case law merits further consideration before extending *Merrion* beyond the fact situation presented therein. The additional non-member property interests at issue here are worthy of this consideration, for, as the Court noted in *Duro*:

> With respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country. *See*, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, and n.7, (1978) (noting that Bill of Rights is inapplicable to tribes, and holding that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, does not give rise to a federal cause of action against the tribe for violations of its provisions). This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-173, (1982) (STEVENS, J., dissenting).

Duro, 110 S. Ct. at 2064.

To suggest that such considerations are not appropriate here because of the holding of *Merrion* is pure sophistry. And the best evidence of this point is the manner in which the United States originally structured this argument before the Court in *Merrion*.

In its initial Memorandum to the Court in *Merrion*, the United States argued that the intervening decision in *Washington v. Confederated Tribes of the Colville Indian*

Reservation, 447 U.S. 134 (1980), was dispositive of the issue in *Merrion*. Memorandum for the Secretary of Interior in Opposition at 2, *Merrion*, 455 U.S. 130. As a result, according to the United States *Merrion* presented "no seriously arguable question of general importance not already authoritatively settled". Memorandum for the Secretary of the Interior in Opposition at 2, *Merrion*, 455 U.S. 130. But on the merits, while accurately reciting the holding in *Colville* as "the power to tax transactions occurring on trust lands and significantly involving the tribe or its members", the United States hedged its position by way of an artful note that the United States really hoped *Merrion* would reflect. Brief for the Secretary of the Interior at 9, *Merrion*, 455 U.S. 130:

> This is not to say, of course, that tribes do not have authority, as one of the "attributes of sovereignty over both their members and their territory [citations omitted] to tax transactions occurring on *fee* land within the reservation, including that belonging to non-Indians. [citations omitted].

Brief for the Secretary of the Interior at 9, n.1, *Merrion*, 455 U.S. 130 (emphasis added). Even the majority in *Merrion* did not, however, go this far. In any event the argument proves too much. This Court meant what it said in *Colville* and said what it meant.

"[T]rust lands" means *trust* lands and not fee lands. Moreover, activity "significantly involving" tribal interests may mean something like the depletion of a vital tribal resource, but should not mean mere right-of-way presence, when that presence is authorized by the federal government.

Colville is significant in one final respect that merits limited discussion. Reduced to its facts, *Colville* only reflects an unsuccessful attempt to market a tax exemption to non-members willing in isolated instances to take advantage of that special situation. It is less than clear how this fact situation, even in view of *Merrion*, can be

fairly said to constitute sovereignty jurisprudence sufficient to have established in this Court a fundamental principle that Indian tribes can tax in fact situations beyond those presented in either case. Yet, as noted *supra*, this is the common perception among advocates of tribal taxation. Perhaps the predisposition of the Ninth Circuit to readily accept almost any tribal position is part of the problem.

While it is undoubtedly significant that any decision of the Ninth Circuit has an especially broad impact in federal Indian law, as petitioner has noted, two additional considerations also bear mention in this respect. For a number of years, the Court of Appeals for the Ninth Circuit has seemed almost prone to categorically accept tribal claims related to full territorial sovereignty within the limits of Indian reservations. Several decisions of this Court support this point:

> In 1977, a congressional Policy Review Commission, citing the lower court decisions in *Oliphant* and *Belgarde*, concluded that "[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians." 1 Final Report of the American Indian Policy Review Commission 114, 117, 152-154 (1977). However, the Commission's report does not deny that for almost 200 years before the lower courts decided *Oliphant* and *Belgarde*, the three branches of the Federal Government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians. As the Vice Chairman of the Commission, Congressman Lloyd Meeds, noted in dissent, "such jurisdiction has generally not been asserted and . . . the lack of legislation on this point reflects a congressional assumption that there was no such tribal jurisdiction." Final Report, *supra* at 587.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 205 (1978).

> The Court of Appeals held that, with respect to fee-patented lands, the Tribe may regulate, but may not prohibit, hunting and fishing by non-member resident owners or by those, such as tenants or employees, whose occupancy is authorized by the owners. *Id.*, at 1169. The court further held that the Tribe may totally prohibit hunting and fishing on lands within the reservation owned by non-Indians who do not occupy that land. *Ibid.* The Court of Appeals found two sources for this tribal regulatory power; the Crow treaties, "augmented" by 18 U.S.C. § 1165, and "inherent" Indian sovereignty. We believe that neither source supports the court's conclusion. . . . The Court of Appeals also held that the federal trespass statute, 18 U.S.C. § 1165, somehow "augmented" the Tribe's regulatory powers over non-Indian land. 604 F.2d, at 1167. If anything, however, that statute suggests the absence of such authority, since Congress deliberately excluded fee-patented lands from the statute's scope. . . . Beyond relying on the Crow treaties and 18 U.S.C. § 1165 as source for the Tribe's power to regulate non-Indian hunting and fishing on non-Indian lands within the reservation, the Court of Appeals also identified that power as an incident of the inherent sovereignty of the Tribe over the entire Crow Reservation. 604 F.2d at 1170. But "inherent sovereignty" is not so broad as to support the application of Resolution No. 74-05 to non-Indian lands. . . .

Montana v. United States, 450 U.S. 544, 557, 561, 563 (1981).

> Initially, we reject as overbroad the Ninth Circuit's categorical acceptance of tribal zoning authority over lands within reservation boundaries . . . The Ninth Circuit, however, transformed this indication that there may be other cases in which a tribe has an interest in activities of nonmembers on fee land into a rule describing every case in which a tribe has such an interest. Indeed, the Ninth Circuit equated an Indian tribe's retained sovereignty with

> a local government's police power, which is contrary to *Montana* itself.

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 428-29 (1989).

> The Court of Appeals concluded that the distinction drawn between 'members' and 'nonmembers' of a tribe throughout our *Wheeler* opinion was "indiscriminate," and that the court should give "little weight to these casual references." 851 F.2d, at 1140-1141. The court also found the historical record "equivocal" on the question of tribal jurisdiction over nonmembers.

Duro v. Reina, 110 S. Ct. 2053, 2058 (1990).

In addition, we would be remiss if we neglected to mention the supporting role the United States has played in this process in the Ninth Circuit and in this Court. *Oliphant*, *Montana*, *Brendale*, and *Duro* reflect historical arguments and documentation that this Court found authoritative and persuasive. Importantly, the United States, advocating tribal territorial sovereignty on behalf of its constituent agencies, formally resisted and rejected each argument of substance in each case (except *Brendale*) until this Court announced its Opinion. Even then, the United States acknowledged only the most narrow application, while renewing all remaining arguments in related litigation then pending, as it has here. This past position of the United States should be borne in mind if the Solicitor General should be inivted to express the views of the United States in this case as in other cases of this kind.

It is not too late in the day for this case, and nonmember interests can ill-afford to wait and see if a decision of another court of appeals will eventually conflict with the decision below, no matter what the United States might say. This is a special and important question of federal Indian law, which has not been, but should

be, clarified and settled by this Court. In the past this Court has been particularly sensitive when similar questions have been presented. For this reason, that sensitivity is sorely needed in the consideration of this particular petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROGER A. TELLINGHUISEN
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November 1, 1991

APPENDICES

APPENDIX A

THREE AFFILIATED TRIBES
OF THE
FORT BERTHOLD RESERVATION

[EMBLEM]

TRIBAL TAX CODE

DECEMBER 1990

Resolution #91-159

RESOLUTION OF THE GOVERNING BODY OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION

WHEREAS, This Nation having accepted the Indian Reorganization Act of June 18, 1934, and the authority under said Act; and

WHEREAS, The Constitution of the Three Affiliated Tribes generally authorizes and empowers the Tribal Business Council to engage in activities on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, The Tribal Business Council adopted the Tribal Tax Code in December of 1990 and staffing was completed in April of 1991; and

WHEREAS, It has been recommended by the Tribal Tax Commission that, Chapter Seven of the Tribal Tax Code be amended to include the following:

SECTION 714. Exemptions.

1. Service Lines. No possessory interest used exclusively to operate a utility service line, utility delivery facility, or utility distribution facility which exclusively serves the Reservation shall be subject to this tax. Possessory interests used to operate utility lines passing through the Reservation and providing service beyond the Reservation boundaries shall not be subject to this exemption.

2. New Wells. All New Wells will be exempt from the Possessory Interest Tax for the first fifteen (15) months of production after January 1, 1991. Those wells in production prior to January 1, 1991, shall not be subject to this exemption.

WHEREAS, In order to maintain the correct numbering sequence, all subsequent sections will be numbered appropriately.

WHEREAS, It has also been recommended by the Tribal Tax Commission that Chapter Seven of the Tribal Tax Code be amended to reflect the following:

SECTION 704. The Tax Cycle.

The initial tax cycle of this Chapter commences on the (1st) of January, 1992, and terminates on December 31, 1994. Thereafter the tax cycle shall take a full three-year period ending the last day in December of the third year of the tax cycle.

SECTION 705. Imposition and Rate of Tax.

The tax rate under this section, and all subsequent sections, will be changed from the preliminary rate of three point five percent (3.5%) to one percent (1%).

SECTION 706. Computation of Value of Possessory Interest.

The valuation for assessment under this section, and all subsequent sections, will be changed from the preliminary assessment of one-hundred percent (100%) to forty-five percent (45%).

SECTION 706.(5)(a)(ii)

The land valuation as described under this section will be changed from $2,800 per acre to the following:

For lands for which there is a contract approved by the United States Department of the Interior, the Bureau of Indian Affairs, the rental fees incorporated in the said contracts shall be the basis of land values for assessment.

NOW, THEREFORE, BE IT RESOLVED, That the Tribal Business Council of the Three Affiliated Tribes hereby adopts and approves the above stated amendments to Chapter Seven of the Tribal Tax Code.

CERTIFICATION

I, the undersigned, as Secretary of the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation, hereby certify that the Tribal Business Council is composed of 7 members of whom 5 constitute a quorum, 7 were present at a Special Meeting thereof duly called, noticed, convened, and held on the 11th day of October, 1991; that the foregoing Resolution was duly adopted at such Meeting by the affirmative vote of 4 members, 1 member opposed, 2 members abstained, 0 members not voting, and that said Resolution has not been rescinded or amended in any way.

Dated the 11th day of October, 1991.

/s/ [Illegible]
Tribal Business Council
Secretary

ATTEST:

/s/ [Illegible]
Chairman, Tribal Business Council

CHAPTER 7: THE POSSESSORY INTEREST TAX OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION

SECTION 701. Statement of Purpose. Pursuant to the provisions of Chapter 1 of this Code, it is the policy of the Three Affiliated Tribes of the Fort Berthold Reservation to provide their members and non-members residing, doing business, or working within the jurisdiction of the Tribe with essential governmental services. To finance this governmental policy, the Tribe adopts in this Chapter a possessory interest tax, which will provide the Tribe with a portion of the revenues necessary to fund essential governmental services within their jurisdiction boundaries and which will benefit all individuals and businesses on the Reservation.

SECTION 702. Short Title. The tax levied by this Chapter shall be called the "Possessory Interest Tax" of real and personal property, which includes any right or interest, and actual ownership obtained in a tract of land, (trust, restricted or fee land), within the boundaries of the Fort Berthold Reservation by lease, permit, contract, easement, right-of-way, deed, or other agreement), which authorizes a person, (as defined hereunder in Section 102.12 of this Code), to use that real and personal property for business, (as defined hereunder in Section 706.1.a.), profit, or use, except as otherwise exempted Section 108 of this Code.

SECTION 703. Definitions.

1. All terminologies and concepts as defined in Section 102, Subsections 1, through 26, of the Code shall apply hereunder.

2. Regulations. "Regulations" shall mean any written rules and regulations adopted and administered by the Tax Commission pursuant to this Code.

3. Taxes. "Taxes" shall mean the tax, and any interest, penalty, or costs, assessed or imposed pursuant to this Code.

4. Commercial Business. "Commercial Business" shall mean any business for profit which is not a utility/railroad, and shall include agriculture, (which includes farming, ranching, grazing, livestock, animal husbandry, and horticulture), and similar land related activities and mining of surface and subsurface rights.

5. Utility. "Utility" shall mean any privately or publicly held entity primarily engaged in supplying, transmitting, transporting or distributing electricity, oil and oil products, gas, natural gas, natural gas products, water, carbon dioxide, liquid hydrocarbons, telephone, telegraph or other communication services, or transportation services including freight services.

SECTION 704. The Tax Cycle. The tax rate and the approaches to determining the appraised value, (i.e., the Tax Base) of the Possessory Interest shall remain constant for a three-year tax cycle. The initial tax cycle of this Chapter commences with the effective date of this Chapter and terminates on December 31, 1992. Thereafter, the tax cycle shall take a full three-year period ending the last day in December of the third year of the tax cycle.

SECTION 705. Imposition and Rate of Tax. The Possessory Interest tax set forth herein shall be imposed on the ownership of posesssory interest on January 1st of each year and shall be assessed at the rate of three and one-half percent (3.5%) of the asesssed value of the possessory interest as determined and appraised in accordance with approaches/methodologies as utilized in Section 706.5. The established said rate and methodologies shall be and remain the same as herein unless modified, pursuant to Section 103 of this Code, by the Tribal Business Council and implemented by the Tax Com-

mission. The said tax rate may not be escalated by more than the annual rate of inflation as measured by the annual average rate of the GNP Price Deflator of the preceding year for the succeeding tax cycles. Upon passage of any determination and resolution changing the tax rate and/or the methodologies, notice shall be given to all taxpayers and shall be published in newspapers of general circulation and posted or published at such places as the Tax Commission designates.

SECTION 706. Computation of Value of Posesssory Interest. The value of a posessory interest shall be assessed as provided in this Chapter or any method adopted by the Tribal Business Council pursuant to Section 103 of this Code. The method reflects the reasonable value of the possessory interest which is subject to taxation.

1. Subject of Valuation.

a. The subject matter of valuation under this Chapter is real and personal property of possessory interest except as exempted under Section 108 of this Code. "Real property" means all lands or interests in land to which title or the right of title has been acquired from the government of the United States on behalf of the sovereign authority of the Tribe and/or lands or interests in land on the Reservation. Real property, moreover, includes all mines, quarries, and minerals in and under the land, and all rights and privileges pertaining thereto; and improvements. "Personal property" means everything which is subject of ownership and which is not included within the term of "real property." "Personal property" includes machinery, equipment, and other articles related to a commercial or industrial operation which are either affixed or not affixed to the real property for proper utilization of such articles. Improvements mean all structures, buildings, furniture, fences, and water rights erected upon or affixed to land, whether or not title to such land has been acquired.

b. For the 1990/1992 tax cycle, two classes of personal and real property shall be the subject matter of valuation as follows:

(i) All real property in mining and extractive activities including the related and associated personal property and improvements.

(ii) All utilities/railroads and their associated and related personal property and improvements thereto.

2. Date of Valuation. All possessory interest which is subject to taxation under this Chapter shall be valued as of the 1st of January of a given calendar year.

3. Valuation for Assessment. The valuation for assessment of all taxable possessory interest shall be one hundred percent (100%) of the actual value thereof as determined by the Tax Commission in the manner described by this Code, and such percentage shall be uniformly applied without exception and discrimination to the actual value of the various classes and subclasses of possessory interest in Reservation lands.

4. Basis of Valuation. The information required for the assessment of actual value for a class of possessory interest during the present tax cycle is that which belongs to the previous tax cycle. If this information is not available, the average for the past five years may be applied. In the ensuing Subsections, the specific nature of the required data is described.

5. Method of Valuation. The value of a possessory interest shall include the ad valorem value of the real and personal property and shall be determined in accordance with the provisions of this Subsection for purposes of possessory interest taxation as follows:

a. All real property in mining and extractive activities including the related and associated personal property and improvements.

(i) The actual value shall be 100 percent of the value as determined by the adjusted gross income of extract-

ing, mining and processing from the Reservation lands less direct costs of such. The Tax Commission shall rely upon the information that the taxpayer submits to other taxing authorities for such purposes.

(ii) The value of land for the purposes of this Subsection shall be set at $2,800/acre for this tax cycle; and may not be escalated by more than the annual rate of inflation as measured by the annual average rate of the GNP Price Deflator of the preceding year for the succeeding tax cycles.

b. All utilities/railroads and the associated and related personal property and improvements thereto.

(i) Statement of Utility Taxpayer/Tax Commission. Every taxpayer of any utility or lands on the Reservation whose possessory interest is in operational mode or is capable of being in operational mode on the assessment date of any year, shall, no later than March 31st of each year, prepare, sign and file with the Tax Commission showing:

(A) The location thereof, and the name thereof, if there is a name.

(B) The name, address, and interest of the utility taxpayer.

(C) The gross operating revenue, the gross operating expenses and the net income exclusive of any non-utility income and deductions of that portion of the utility facility on the Reservation.

(D) For the utilities subject to the jurisdiction of the FEDERAL REGULATORY AUTHORITIES, the information incorporated in their related forms they file with those authorities shall be adequate. For others, the similar information they file with the state regulatory commissions authorities shall suffice the purpose.

(ii) On the basis of information contained in such statements as in (i) above, the Tax Commission shall value such utilities/railroads' possessory interests in accordance with the capitalization income method. The value of a possessory interest for utilities/railroads shall be determined, thus, by computing the capitalized value of the net income exclusive of any non-utility income and deductions as a proportion of the utility's facilities on the Reservation. The capitalization rate shall be set at thirteen percent (13%) except when and if the taxpayer demonstrates a different and higher number. The "reasonable" expenses to be incurred in producing the proportional annual net income shall be allowed, and the proper adjustment that the regulatory authorities do not allow to be included in their forms shall also be allowed. Such capitalization shall be done for the remaining life of the possessory interest. If the possessory interest life is indefinite, the life of the possessory interest shall be presumed to be twenty-five (25) years for the purposes of this method.

(iii) The value of land for the purposes of this Subsection shall be set at $2,800 per acre; and the said value may not be escalated by more than the annual rate of inflation as measured by the annual average rate of the GNP Price Deflator of the preceding year for the succeeding tax cycles.

SECTION 707. Assessment of Tax.

1. The Tax imposed by this Chapter is based upon the return filed by the taxpayer.

2. The Tax Commission shall be authorized to assess taxes against a taxpayer and such assessments are presumed to be correct.

3. When it appears that the return filed by the taxpayer does not reflect the tax due under this Chapter, the Tax Commission shall assess the taxpayer for the deficiency, interest, penalties, and costs.

4. If not return is filed, the Tax Commission is authorized to make an estimate of the tax due, and to assess the taxpayer for that tax, interest, penalties, and costs. The assessment is binding on the taxpayer.

5. If the taxpayer fails to provide information within its posesssion or control which is relevant to an assessment of taxes due, and which it is required to provide under this Chapter, the Tax Commission is authorized to make an estimate of the tax due and to assess the taxpayer for that tax, interest, penalties, and costs. This assessment is binding on the taxpayer unless it is shown that the estimate, on the basis of the best information available to the Tax Commission, was clearly erroneous.

SECTION 708. Tax Declaration and Designation of Natural Person. Every entity or person owning any nonexempt possessory interest on the interest on the Reservation shall designate a natural person as the individual empowered by the taxpayer to act on behalf of the taxpayer with respect to all matters involving the possessory interest tax. Said designated natural person shall complete the forms distributed by the Tax Commission and shall provide the information required therein.

SECTION 709. Reporting Requirements. Each taxpayer shall comply with the following reporting requirements and such other requirements as are by rules or regulations adopted by the Tax Commission:

1. Forms. The Tax Commission shall provide taxpayers with forms for the reporting of the value of all possessory interests to the Tribe. Information reported by the taxpayer on these forms shall be the basis for assessment of tax due.

2. Reporting Date. Each taxpayer shall report the value of its possessory interests by March 31st of the year following the tax year. If the date of submittal of the report to the related regulatory authority, as required

in Subsection 706.5.b.(i)(D) is after March 31st, the report for the previous year may be accepted.

3. Extension of Time. Upon timely written request to the Tax Commission, a taxpayer may request an extension of time within which to report the value of its posesssory interests; and for good cause shown, the Tax Commission may extend, for a period not to exceed thirty (30) days, the reporting date, but no further extension shall be allowed. Such a request for extension, to be timely, must be received by the Tax Commission prior to the reporting date. Requests for extension received by the Tax Commission after the reporting date shall not be considered. If the Tax Commission extends the date for filing valuation reports for a taxpayer, the date for mailing the notice of tax assessment to that taxpayer provided for in Section 710 of this Chapter shall automatically be extended by the amount of additional time granted the taxpayer for filing the valuation reports.

4. Failure to Report, Administrative Valuation. If a taxpayer fails to file substantially complete possessory interest tax reporting information, or to otherwise provide requested information or documents within its possession or control which are relevant to an assessment of the extent or value of its possessory interests, the Tax Commission may proceed to assess the value of the taxpayer's possessory interests and to assess taxes accordingly. This assessment will be binding on the taxpayer unless it shows that the valuation, on the basis of the best information available to the Tax Commission, was clearly erroneous or unless the Tax Commission for other good cause shown relieves the taxpayer from the operation of this Subsection.

5. Reporting Value of Exempt Interests. No taxpayer or entity shall be required to file property valuation forms for any possessory interest which is exempt under Sections 108 and 406 and other relevant Sections of this

Code, provided that the Tax Commission may require any taxpayer or entity to file the information necessary to establish the claimed tax exemption.

6. Authority of the Tax Commission. The Tax Commission may by form or regulation require any taxpayer to file the information or documents deemed necessary for the proper and efficient administration of the tax.

7. Administrative Reports. The Tax Commission shall report all possessory interest tax activities and collections to the Tribal Business Council at least annually.

8. Amended Returns. Amended returns for assessment may be filed, and will be considered for a period of one year from the date of the original report. After one year, all reports will be considered final.

Any refunds of overpayments as a result of corrected assessment will be paid to the taxpayer.

SECTION 710. Notice of Assessment and Payment of Taxes Due. Notice of tax assessment and of the amount of tax due shall be mailed by the Tax Commission by April 30th of the year following the tax year, unless that date has been extended pursuant to Section 709.3 of this Chapter. The assessed tax shall be paid within thirty (30) days of the date of mailing said notice, unless another date is specified by the Tax Commission in the notice of assessment or the due date has been extended pursuant to Section 711 of this Chapter. Any taxes assessed shall be paid by check or money-order made payable to the Three Affiliated Tribes Tax Commission. Payment is timely made if it is postmarked before midnight on the date on which the tax is due or if it is delivered to the Tax Commission by certified mail or in person and a receipt is given before midnight on the due date.

SECTION 711. Extension of Time for Paying Tax. Upon the filing with the Tax Commission of a timely request for an extension of time within which to pay as-

sessed taxes, and upon a showing of good cause, the Tax Commission may extend, for a period not to exceed forty-five (45) days, the due date for payment of taxes assessed, but no further extension shall be allowed. Such a request for extension, to be timely, must be filed on or before the date the assessed taxes are due. The penalty for late payment as provided for in Section 712 of this Chapter shall not apply to any payment for which an extension has been granted.

SECTION 712. Penalty for Late Payment. Any taxpayer failing to pay the amount of tax assessed by the due date, except in cases where extensions have been granted, shall pay a penalty on the outstanding balance in accordance with the provisions of Chapter 3 of the Code.

SECTION 713. Lien for Taxes.

1. Lien Against Possessory Interest. The procedures for placing a lien against the possessory interest shall be according to the provisions of Section 408 of the Code.

SECTION 714. Method of Claiming Exemption. Any taxpayer owning both taxable and exempt possessory interests shall file with the Tax Commission a claim for any exemption. The claims for exemption shall be filed on the form provided by the Tax Commission and at the time of filing the valuation reports required by Section 709, and shall be accompanied by a map clearly indicating the specific property for which exemption is claimed. Any taxpayer owning only exempt possessory interests shall be required to claim such exemptions only at the written request of the Tax Commission.

SECTION 715. Appeal Procedures for Protested Taxes. All administrative and legal remedies are those authorized in Chapter 5, Sections 501-507 of the Code.

SECTION 716. Collection Powers. The Tax Commission, in the name of the Tribe, shall have full power to collect taxes and penalties assessed, including the power to file suit in Fort Berthold District Court or in any other court

of competent jurisdiction, and to execute on any judgment by all appropriate legal remedies including attachment and seizure of the assets of any delinquent taxpayer. The procedures for enforcement are set forth in Chapter 4, Sections 401-409.

SECTION 717. No Waiver of Sovereign Immunity. Any challenge to the validity or application of this Chapter shall be pursuant to Section 104 of this Code.

SECTION 718. Severability. If any part or application of this Chapter is held invalid, the remainder of the Chapter or its application to other situations or taxpayers shall not be affected.

SECTION 719. Use of Tax Proceeds. The use of proceeds shall be approved by the Tribal Business Council to defray the costs of providing essential governmental services on the Reservation and for other purposes as approved by the Tribal Business Council.

SECTION 720. Amendment. This Chapter may be amended by resolution passed by the Tribal Business Council in accordance with the Constitution of the Tribe. The Tax Commission shall notify taxpayers of any amendments in the manner considered appropriate by the Tax Commission under Tribal laws.

SECTION 721. Effective Date. This Chapter shall be effective on the date of its adoption by the Tribal Business Council, subject to review by the Secretary pursuant to the Constitution and the By-laws of the Tribe.

SECTION 722. Conflict With Other Applicable Law. In the event of a conflict between provisions of this Code and any other provision of applicable law that by its terms is applicable to taxation, this Code shall supersede and be controlling.

APPENDIX B

THREE AFFILIATED TRIBES • FORT BERTHOLD RESERVATION

MANDAN, HIDATSA, AND ARIKARA TRIBES
TAX COMMISSION

Tribal Administration Buildings
P.O. Box 1058
New Town, North Dakota 58763
(701) 627-3226

May 31, 1991

RE: *CLARIFICATION OF TRIBAL JURISDICTIONAL AUTHORITY*

Dear ————————:

This letter is written to clarify the misconceptions regarding the possessory interest tax code of the Three Affiliated Tribes.

Public hearings were held in Bismarck, North Dakota on the 17th and 18th days of April, 1991. The purpose of the public hearings was to present you with the tribal possessory interest tax code and to, in turn, offer you the opportunity to submit your written comments and concerns to the Tribe regarding the proposed tax code.

Everyone in attendance at the public hearings was informed that the Code was not in final form and that any comments or suggestions duly submitted would be considered by the Tribal Business Council. The Tribal Business Council may, within its discretion, determine that it will allow certain exemptions. However, on the other hand, the Council could determine not to create any exemptions at all. The final determination for the implementation of the possessory interest tax is completely within the total discretion of the Tribal Business Council. The Legal Department, tax department and tax commission can make certain recommendations; however, the final draft of the

tax code, and its implementation thereto, will be determined by the Tribal Business Council. If the Tribal Business Council, chooses to incorporate agriculture into the tax code, the Council will be well within their legal authority to do so. If the Tribal Business Council chooses to exempt fee lands for the first (1st) year tax year, the Council may create this exemption or it may not. Due to the lateness for the implementation of the Tribe's possessory interest tax, the Legal Department in conjunction with the tax department may recommend that the Tribal Business Council create certain exemptions; however, the Tribal Business Council, as the Governing Body, will make the final decision on the granting of and tax exemptions.

The Tribal Business Council of the Three Affiliated Tribes recognizes that its power to levy taxes are twofold, to wit: its governmental authority to regulate its own territory and, with respect to non-members, its powers to exclude them from the reservation.

The Tribal Business Council recognizes that chief among its powers of sovereignty is the power of taxation, which may be exercised over members of the Tribe and over non-members insofar as said non-members may accept such privileges of, but not limited to, trade, residence and commercial dealings to which taxes may be attached as conditions. Furthermore, the Tribal Business Council recognizes the principles of federal Indian law whereby Indian tribes possess the power to tax transactions of non-Indians when said activity involves the Tribe or its members unless the Congress has unequivocally and expressly divested the Tribes of jurisdiction by federal law.

The Tribal Business Council of the Three Affiliated Tribes in order to enhance the social welfare, health, and security and economic well-being of the residents of the Fort Berthold Reservation duly passed the implementation of the possessory interest tax. The Tribal Business Council recognizes its inherent sovereign authority for the

implementation of taxes for the purposes of generating revenue for essential governmental services to all residents of the reservation. The Tribe recognizes its sovereign powers to tax within the territorial boundaries of the Fort Berthold Reservation. The Supreme Court has never stated that Indian tribes do not possess the power to tax fee lands. The Supreme Court has stated, however, that in many instances there exists concurrent taxing authority by both the States and the Indian Tribes to tax activities occuring within the boundaries of a reservation.

In conclusion, the Tribal Business Council recognizes the legal principles enunciated by the Supreme Court, that Indian tribes may regulate, through *taxation*, licensing or other means, the activities of non-members who enter into consensual relationships with the Tribe or its members.

With best regards, I remain

/s/ P. Diane Johnson
PATRICIA DIANE JOHNSON
Staff Attorney
Three Affiliated Tribes
New Town, North Dakota 58763

cc: To all in attendance at the Public Hearings held April 17 & 18, 1991 at Bismarck, North Dakota, and to all of those individuals and organizations who submitted comments to the Tax Department.

APPENDIX C

THREE AFFILIATED TRIBES • FORT BERTHOLD RESERVATION

MANDAN, HIDATSA, AND ARIKARA TRIBES
TAX COMMISSION

Tribal Administration Buildings
P.O. Box 1058
New Town, North Dakota 58763
(701) 627-3226

June 24, 1991

Dear ————————:

Thank you for your comments and concerns expressed in your letter, dated May 8, 1991. Following is the Tax Commissions reply to your questions you have presented to us.

The Three Affiliated Tribes has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and do business. This sovereign power attaches to all lands within the exterior boundaries of the Fort Berthold Reservation. The Tribal Business Council has decided to tax those oil, gas, utility and railroad activities located on the entire reservation, including any facilities and lines of those entities to be taxed which are located upon fee lands, which is their right. Those persons who own fee lands which are used for agricultural or other private business purpose will not be subject to the Possessory Interest Tax, excluding of course those entities subject to be taxed under section 708 of the Tribal Tax Code.

The following definitions of Land Ownership have been provided by Mr. Arnie Guimont, Realty Specialist for the Bureau of Indian Affairs, in New Town, ND.

Trust Land:

> Land that the title is held in trust by the United States for the benefit of a Tribe or Individual Indian.

Restricted Land:

> Lands where the title is vested in an individual Indian with restrictions against encumbrances and alienation.

Fee Land:

> Lands where a fee simple patent has been issued by the United States.

The methodology for using $2,800 per acre as the value of land was established by the Federal Energy Regulatory Commission and is known as the Opportunity and/or Avoidance Cost. The basis for this cost is computed by taking the difference between what it would cost your company to go around the Fort Berthold Reservation, with your power lines, compared to what it would cost to go through the Reservation. The land value of $2,800 per acre is approximately fifty percent of what it would cost to construct your power lines around the exterior boundaries of the Fort Berthold Reservation.

The question concerning depreciation can best be answered with the fact that your companies do use depreciation each year you figure your State and Federal Income Tax. So it is a deductible item to you.

In regards to Section 408.1, "Lien Against Possessory Interest", All taxing authorities (state, federal, county and city) require a first lien against all property and rights to property of the taxpayer in favor of that taxing authority to secure payment of any taxes, penalties and interests that become due. This lien will only affect your ability to obtain a loan should Oliver-Mercer Electric and other Cooperatives fail to timely file and pay their taxes.

The Gross Operating Income, on Line 4, Schedule B, is the Gross Income for your entity. This figure should be the same one submitted to State and Federal Governments when figuring your yearly Income Tax.

The Possessory Interest Tax, by-way-of resolution, was implemented December 13, 1990. Where by the Possessory Interest Tax is to be paid in 1991, using production and income information obtained from 1990 actual figures.

Enclosed you will find a copy of the Tribal Constitution and Bylaws, for the Three Affiliated Tribes.

Thank you again, Mr. ———, for your comments and concerns. We will notify you of the date and time of the upcoming workshop and if we can be of any further assistance, please don't hesitate to call.

Sincerely,

/s/ Tom Needham
TOM NEEDHAM
Assistant Executive Director

APPENDIX D

THREE AFFILIATED TRIBES • FORT BERTHOLD RESERVATION

MANDAN, HIDATSA, AND ARIKARA TRIBES
TAX COMMISSION

Tribal Administration Buildings
P.O. Box 1058
New Town, North Dakota 58763
(701) 627-3226

August 8, 1991

Dear ————————:

Due to requests received by the Tax Commission regarding an additional period in which to submit information requested at the Bismarck, North Dakota and New Town, North Dakota meetings, the due date for this information has been extended. The new due date will be August 23, 1991.

In addition, due to the cancellation of projects planned for the reservation by the companies which may become subject to the Possessory Interest Tax, no other extension will be deemed waranted. Several of the companies in question have stopped projects until a final decision has been made by the Tribal Business Council. A rational, intelligent decision, as I am sure you are well aware, should not be made until all facts are received and analyzed. But, due to the above stated circumstances, a decision will be forthcoming shortly after the August 23, 1991, deadline utilizing information the Tax Commission has at that time.

Your assistance in this matter has been greatly appreciated.

Sincerely,

/s/ Joseph J. Walker
JOSEPH J. WALKER
Tax Commissioner/
Executive Director

APPENDIX E

Resolution No. 85-244-e

RESOLUTION OF THE GOVERNING BODY OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION

WHEREAS, This Nation having accepted tne Indian Reorganization Act of June 18, 1934, and the authority under said Act; and

WHEREAS, The Constitution of the Three Affiliated Tribes generally authorizes and empowers the Tribal Business Council to engage in activities on behalf of and in the interest of the welfare and benefit of the Tribes and of the enrolled members thereof; and

WHEREAS, The Reservation Telephone Cooperative of Parshall, North Dakota is extending telephone service lines through out the Fort Berthold Reservation for the benefit of members of the Three Affiliated Tribes, and

WHEREAS, The right-of ways for the telephone lines are considered "Beneficial Right-Of-Ways", as they provide a much needed service to tribal members, and

WHEREAS, The Reservation Telephone Cooperative is a member owned [cooperative] and any additional charges for access or damages would be charged to the end user,

NOW THEREFORE BE IT RESOLVED, Telephone Rights-of-Way will be processed with out access fees or damages acessed to the cooperative on those lands owned by the Three Affiliated Tribes.

CERTIFICATION

I, the undersigned, as Secretary of the Tribal Business Council of the Three Affiliated Tribes of the Fort Berthold Reservation, hereby certify that the Tribal Business

Council is composed of 11 members of whom 7 constitutes a quorum, 8 were present at a Regular Meeting, thereof duly called, noticed, convened, and held on the 12 day of December 1985; that the foregoing Resolution was duly adopted at such meeting by the affirmative vote of 7 members, 1 members opposed, 0 members abstained, 0 members not voting, and that said Resolution has not been rescinded or amended in any way.

Chairman (voting)

Dated this 12 day of December, 1985.

/s/ [Illegible]
Secretary,
Tribal Business Council

ATTEST:

/s/ [Illegible]
Chairman,
Tribal Business Council

APPENDIX F

§ 319. Rights-of-way for telephone and telegraph lines

The Secretary of the Interior is authorized and empowered to grant a right of way, in the nature of an easement for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the former Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding $5 for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the trans-

mission of messages over any lines constructed under the provisions of this section; *Provided*, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

(Mar. 3, 1901, ch. 832, § 3, 31 Stat. 1083.)

APPENDIX G

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

[22 Aug. 1988]

Honorable Orrin Hatch
135 Russell Senate Office Building
Washington, D.C. 20510

Subject: S. 2747; "Indian Civil Rights Act Amendments of 1988"

Dear Senator Hatch:

I am writing in support of S. 2747, a bill to amend the Indian Civil Rights Act of 1968, 82 Stat. 77-78 (Public Law 90-284) (Title II of the Civil Rights Act of 1968). The amendment strengthens enforcement of the ICRA by providing federal courts with carefully structured jurisdiction to enforce individual rights under the Act.

The amendment is necessary, in our view, because existing ICRA compliance procedures fail to fully protect rights secured by the ICRA. In some cases, for example, tribal courts do not exist. In other circumstances, tribal courts may lack authority to review actions of tribal governments. In addition, sovereign immunity and other jurisdictional barriers may limit the ability of tribal courts to effectively enforce the ICRA. Finally, because many tribal courts are subordinate to other branches of tribal government, judicial independence suffers; the lack of a meaningful separation of tribal powers may result in an impermissible interference with the work of tribal courts.

1. *Introduction*

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-3, fills the void left by the Constitution's failure

to limit or restrict tribal authority. See, *Talton* v. *Mayes*, 163 U.S. 376 (1896). The Act provides "for the American Indian the broad constitutional rights afforded to other Americans," and thereby "protect individual Indians from [unwarranted] actions of tribal governments". *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967)). While the ICRA contains many of the protections found in the Constitution, except for habeas corpus, it is unenforceable in federal courts. Instead, tribal forums enjoy exclusive jurisdiction of civil actions brought to enforce the ICRA. *Santa Clara Pueblo*, *supra*. The enforcement of such basic guarantees as free speech, due process and equal protection are wholly dependent on the effectiveness of tribal institutions and procedures—often the same tribal institutions and procedures alleged to have violated the act. We understand that the purpose of the proposed amendment is to remedy tribal noncompliance with the ICRA by providing access to federal district courts. Federal district court jurisdiction, together with a right of action by aggrieved individuals or the Attorney General, will check current compliance problems and assure a meaningful ICRA enforcement program.

Although tribal measures to enforce the ICRA are available in theory, such remedies may be unavailable in practice. Nearly one-half of all tribal governments, for example, have no tribal court. Where tribal courts exist, they may lack the power to review legislative or executive action, suffer jurisdictional impediments or be subordinate to the tribal council. Since the Supreme Court's decision in *Santa Clara Pueblo*, *supra*, the available literature, including the Report of the Presidential Commission on Indian Reservation Economies, and a number of federal court decisions, question the effectiveness of ICRA enforcement in tribal court. Allegations of ICRA violations also surfaced recently in hearings

held by the United States Commission on Civil Rights. In testimony taken in Washington, D.C., Rapid City, South Dakota, Flagstaff, Arizona, and Portland, Oregon, a number of Indians and non-Indians shared evidence of non-compliance with the ICRA.

In order to assure that rights secured by the ICRA are enforced fully, change in the existing compliance procedure—including expanded access to federal district courts—is critical. Federal district court ICRA enforcement jurisdiction, coupled with the requirement of exhausting available tribal remedies and the other limitations built into the amendment, balance legitimate tribal interests with a meaningful and effective ICRA compliance program. Without the amendment proposed here, or one very similar, individual rights guaranteed by Congress will remain a largely unfulfilled promise; one which continues to protect individual rights in theory but not in practice.

2. *Failure to Enforce the ICRA Fully Post Santa Clara Pueblo*

For 10 years prior to *Santa Clara Pueblo*, *supra*, the ICRA was routinely enforced in both tribal and federal courts. In fact, there is a strong presumption that an effective ICRA enforcement program encourages capital investment, jobs and tribal economic development generally. See, *e.g.*, *Report and Recommendations To The President Of The United States*, Presidential Commission On Indian Reservation Economies, November, 1984. At least three factors, however, contribute to current ICRA non-compliance at the tribal level: first, judicial review may be unavailable or limited; second, tribal sovereign immunity and other jurisdictional impediments may bar or limit ICRA relief; and, third, tribal governing bodies may interfere with tribal courts.

a. *The Lack of Meaningful Judicial Review*

Tribal courts lack clear authority to review tribal government action. See, Ziontz, *After Martinez: Civil*

Rights Under Tribal Governments, 12 U.C. Davis L. Rev. 1, at 10-12 (1980). In some tribes, judicial review may be limited or not exist at all. Tribal courts are available in only about one half of the nation's nearly 300 federally recognized Indian tribes. See, *e.g.*, *Santa Clara Pueblo*, *supra*. In other tribes, judicial review may be limited. The Cheyenne River Sioux Tribe, for example, explicitly reserves final authority over tribal action to tribal councils and not tribal courts. A recent Cheyenne River resolution states in part:

> BE IT FINALLY RESOLVED, that the Council shall retain the power to review the decision of the Tribal Court of Appeals on issues of law under such conditions and procedures as are found by the Council to be appropriate.

Cheyenne River Sioux Tribal Resolution No. 213-85-CR. Still other tribal councils address judicial review on a case-by-case basis. See, for example, Oglala Sioux Tribal Resolution No. 87-76 which provides in part:

> WHEREAS, the Oglala Sioux Tribe has reviewed the actions of the Tribal Court and Tribal Court of Appeals in the *Moore* case and find that the said courts have exceeded their authority under Ordinance No. 86-09, now
>
> THEREFORE BE IT RESOLVED, that the Oglala Sioux Tribal Council hereby declares that all court orders in the case of *Margaret Moore* v. *Oglala Sioux Tribal Personnel Board, et al.*, are hereby declared null and void.

Elsewhere the rule may not be as clear, but the same tribal body against which suit has been filed may be also called upon to determine its propriety. See, *Runs After* v. *United States*, 766 F.2d 347, 353 (8th Cir. 1985), citing Justice White's dissent in *Santa Clara Pueblo*.

b. *Sovereign Immunity and Other Jurisdictional Barriers to ICRA Enforcement in Tribal Court*

In addition to those tribes which have no court or refuse to permit full judicial review, some tribes further frustrate meaningful ICRA enforcement by relying on the doctrine of sovereign immunity. For example, former Cheyenne River Chairman Morgan Garreau provided the following testimony to the United States Commission on Civil Rights:

> MS. MILLER: Do you believe that sovereign immunity is a bar to Indian Civil Rights Act claims against the tribe [in tribal court]?
> MR. GARREAU: Yes, I do. [The question] has come to the tribal council with regard to [a] waiver of sovereign immunity. As I stated, I sat on the tribal council. I served as administrative officer. At no time during those years, I believe from 1979 to the present [1986], has the tribal council ever waived sovereign immunity for anyone, for any case or cause at all.
> MS. MILLER: So what that means is you are saying that the Indian Civil Rights Act really is unenforceable as against the tribe?
> MR. GARREAU: Unless the council waives sovereign immunity.
> MS. MILLER: Which it hasn't done.
> MR. GARREAU: No, they have not, for anyone.

Hearings, *supra*, at p. 377.

Cheyenne River is not an isolated case. Tribal court decisions which dismiss or limit ICRA actions by invoking sovereign immunity have occurred in a number of jurisdictions. For example, in *Satiacum* v. *Sterud*, No. 82-1157 (Puy. Tr. Ct., April 23, 1982), 10 Indian L. Rep. 6013, the Puyallup Tribal Court rejected the argument that *Santa Clara Pueblo* "represents an explicit waiver of the tribe's immunity" in an ICRA action in

tribal court. *Id.* at 6015. See, also, *Whatoname* v. *Hualapai Tribe et al.*, Civil No. 003-80 (Hualapai Ct. of App., May 11, 1981) (The tribal court dismissed an ICRA case commenting that "[i]t is difficult for this Court to fathom how the Indian Civil Rights Act can be said to waive the immunity of the Tribe in its own Courts by implication while such waiver by implication was expressly rejected by the federal courts". Unreported slip op. at 8). In *DuBray* v. *Rosebud Housing Authority*, No. CIV83-01 (Rosebud Sioux Tr. Ct., Feb. 1, 1985), 12 Indian L. Rep. 6015 (*app. pndg.*, South Dakota Intertribal Ct. of App.), the tribal court found "no provision in the tribal code which would waive the tribe's immunity to suits based on claims under [the ICRA]". *Ibid.* Therefore, the tribal court continued, "because the tribe's immunity has not been waived, the plaintiffs' [ICRA] complaint must be dismissed." *Ibid.*

The Colville Tribal Court, relying in part on a tribal ordinance which held that "the Colville Confederated Tribes shall be immune from suit in any civil action, and their officers and employees immune from suit for any liability arising from the performance of their official duties," dismissed a reapportionment suit against the tribal Business Council brought pursuant to the ICRA. *Colville Confederated Tribes Business Council* v. *George*, No. CV84-402, (Colv. Tr. Ct., Nov. 8, 1984), 11 Indian L. Rep. 6049, 6050. See, also, *Garman* v. *Fort Belknap Community Council*, No. CV83-238, (Ft. Blkp. Tr. Ct. Jan. 20, 1984), 11 Indian L. Rep. 6017 (ICRA case dismissed against tribal defendants with the observation that the tribe has "not chosen to expressly waive tribal sovereign immunity to allow enforcement of the Indian Civil Rights Act in tribal courts") and the cases cited by Johnson and Madden, *Sovereign Immunity In Indian Tribal Law*, 12 Am. Indian L. Rev. at 167, n. 59 (1984).

In cases where sovereign immunity presents no bar to ICRA enforcement, other jurisdictional considerations

may intervene. For example, tribal court civil jurisdiction may be limited to cases in which both parties are members of the tribe or each consent to tribal court jurisdiction. See, *Dry Creek Lodge, Inc.* v. *Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981) ("[A]ccess was denied to tribal court". *Id.* at 685. (Holloway, J., dissenting)).

c. *The Lack of Judicial Independence Contributes to ICRA Non-Compliance*

Although some tribal courts may be successful in establishing the principle of judicial review and, further, may even overcome serious jurisdictional barriers such as the doctrine of sovereign immunity, other obstacles may still impede the full enjoyment of rights secured by the ICRA. Tribal governing bodies, for example, may interfere with the process of tribal courts. While there may be the appearance of ICRA enforcement at the tribal level, the reality is often impaired by a lack of tribal separation of powers or judicial independence. The 1984 Report of the Presidential Commission on Indian Reservation Economies found that the

> failure [of tribal governments] to adhere to a constitutional principle separating executive, legislative and judicial powers has had a detrimental effect on [tribal] governmental functioning. For example, the failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the rule of law.

Report And Recommendations To The President Of The United States, *supra*, Part One, 29.

Recent hearings before the United States Commission on Civil Rights provides further evidence that tribal courts may be preempted in their effort to enforce rights

secured by the ICRA. Former Chief Judge Trudell Guerue of the Rosebud Sioux Tribal Court wrote that there is an "absence of any forum in which the Indian Civil Rights Act is enforceable." Guerue, *The Indian Civil Rights Act—How it is Used As License And Not As Protection*, 1986, 3 (unpublished paper in the files of the United States Commission On Civil Rights). This is true, according to Guerue, because tribal councils control tribal courts; "removal from office or the bench is not an uncommon tribal council tool." *Id.* at 4. This lack of judicial independence or separation of tribal powers was echoed by a number of other Indian judges. For example, former tribal judge Walter Woods of the Cheyenne River Sioux Tribe testified before the Civil Rights Commission that tribal

> judges are politically appointed so they can be controlled by the council. If they make decisions that are not favorable with the council, then they will be removed without a hearing—because I know; I was one of the individuals that was removed.

Hetarings before the United States Commission on Civil Rights. Rapid City, S.D., 1986, 392. Former Cheyenne River Sioux Tribal Chairman Garreau confirmed that "[a]ll it takes is just an action of the tribal council to remove a judge." *Id.* at 383.

A number of federal court decisions further underscore the lack of an independent tribal judiciary. In *Shortbull* v. *Looking Elk*, 677 F.2d 645 (8th Cir.) cert. denied, 459 U.S. 907 (1982), the Eight Circuit noted that "because of [a tribal court] ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the tribal Executive Committee, who quashed Judge Red Shirt's orders." *Id.* at 650. Similarly, in *Runs After* v. *United States*, *supra*, the Eighth Circuit found that after the tribal court upheld a contested voting redistricting plan "the Tribal Council terminated the tribal court judge * * * and appointed a new

tribal court judge." *Id.* at 348. In addition, the tribe "forever barred" the original *Runs After* judge from tribal political or elective office. Resolution No. 190-84-CR, Cheyenne River Sioux Tribe, July 12, 1984. *Id.* at 349.

3. *The Need To Expand Federal District Court ICRA Jurisdiction*

With the exception of habeas corpus authority, ICRA enforcement is now left exclusively to tribal forums. The Supreme Court's dicta that tribal forums are "available to vindicate rights created by the ICRA", *Santa Clara Pueblo*, *supra*, at 65, has, in some cases, not proved accurate. The failure to establish tribal courts, the lack of judicial review, the doctrine of sovereign immunity, jurisdictional barriers, and tribal council interference with tribal courts are some of the factors which impede full tribal enforcement of rights secured by the ICRA. Administrative solutions, including budget priority and more training for tribal judges, while important, solve only part of the problem; standing alone such remedies fail to address the systemic or institutional factors discussed above.

Several federal court decisions recognize the anomaly of creating statutory rights without an adequate enforcement mechanism or remedy. In *Garreaux* v. *Andrus*, 676 F.2d 1206 (8th Cir. 1982), for example, the Eighth Circuit acknowledged "that the plaintiffs are being treated unfairly by the tribal council" but, citing *Santa Clara Pueblo*, went on to hold that federal courts lack statutory authority to consider ICRA claims. *Id.* at 1210, n. 2. See also, *Shortbull* v. *Looking Elk*, *supra*; and *R. J. Williams Co.* v. *Fort Belknap Housing Authority*, 509 F. Supp. 933, 939 (D.C. Mont. 1981), rev'd and remanded on other grounds, 719 F.2d 979 (9th Cir. 1983), cert. denied, 472 U.S. 1016 (1985) ("This case illustrates the absurd results that the broad rule of [*Santa Clara Pueblo*] can cause.").

Courts, however, properly defer to congressional action. In *Wells* v. *Philbrick*, 486 F. Supp. 807 (D.S.D. 1980), for example, the court said

> [i]t certainly may be argued that the effect, after *Santa Clara Pueblo*, of the ICRA is to create rights while withholding any meaningful remedies to enforce them, but it is for Congress, not the Courts, to resolve this state of affairs [citing *Santa Clara Pueblo*, 436 U.S. at 72].

Id. at 809 [citation omitted].

Evidence of non-compliance with rights secured by the ICRA is important because, as the Court noted in *Santa Clara Pueblo*,

> Congress' authority over Indian matters is extraordinarily broad * * * Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [the ICRA], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions.

Id. at 72. In fact, the Presidential Commission on Indian Reservation Economies has made such a recommendation. The Commission, in its November 1984 report, recommends

> that legislation be provided for appellate review of tribal court decisions to the federal court system where constitutional or statutory rights are involved.

Report And Recommendations To The President, *supra*, Part One at 30.

Support for federal court ICRA enforcement authority can be found in the literature as well. Professor Wilkinson, for example, argues "that federal judicial review of tribal action is often appropriate and perhaps should be expanded". Wilkinson, *American Indians, Time, and the Law*, Yale Univ. Press, 1987, 113. A similar view was

voiced by Gover and Laurence. In discussing the need to modify both *Santa Clara Pueblo, supra*, and *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), they suggest that:

> [t]he legislative branch seems well-suited to judge the sophistication of Indian judicial systems * * *. [A legislative] modification of [*Santa Clara*] to grant a careful and not overly disruptive federal oversight of [tribal] jurisdiction might be acceptable. We leave the details of such legislation in the capable hands of Congress * * *. It would place a scalpel back in the federal judge's hand * * *

Gover and Laurence, *Avoiding Santa Clara Pueblo* v. *Martinez: The Litigation In Federal Court of Civil Actions Under The Indian Civil Rights Act*, (Symposium on Indian Law), 8 Hamline L. Rev. 497, 523 (1985).

A number of tribal judges also recognize the need for federal court ICRA jurisdiction. Judge Sambroak of the Rosebud Sioux Tribal Court provided the following testimony to the United States Commission on Civil Rights:

> MR. MCDONALD: Do you believe the ICRA should be amended to allow [a] private right of action in federal court?
>
> JUDGE SAMBROAK: Yes.

Hearings, before the United States Commission on Civil Rights *supra*, at 250. Chief Judge Lorraine Rousseau of the Sisseton Wahpeton Sioux Tribal Court echoed the same theme when she told the Civil Rights Commission:

> I guess what I'm saying is there may be a need for limited jurisdiction by the federal courts in certain cases.

Briefing Before the United States Commission on Civil Rights, Washington, D.C., February, 1986, at 196.

4. *Conclusion*

Santa Clara Pueblo, which held that federal courts lack jurisdiction after 10 years of ICRA enforcement, was premised on the assumption that "[t]ribal forums are available to vindicate rights created by the ICRA." *Id.* at 65. The record now shows serious tribal "deficien[cies] in applying and enforcing" the ICRA. Accordingly, we look to Congress, as did the Court in *Santa Clara Pueblo*, to permit "civil actions for injunctive or other relief to redress violations of [the ICRA]." *Id.* at 72. Systemic, institutional factors, including the lack of judicial review, jurisdictional impediments, sovereign immunity and the failure to provide for effective judicial independence, often contribute, as a practical matter, to the failure to enforce fully rights secured by the ICRA post *Santa Clara Pueblo*.

As tribal governments flourished under the policy of self-determination, the number of tribal courts autonomous from the federal government has also grown. In addition to providing for federal court ICRA enforcement authority, the legislation contains a number of incentives to strengthen and further develop tribal courts. Specifically, the amendment encourages tribal courts to resolve ICRA complaints by requiring individuals to exhaust tribal remedies before seeking a federal court solution, by limiting federal relief to equitable remedies, by requiring federal courts to adopt tribal findings of fact if certain circumstances are met, and by providing for deference to tribal court interpretation of tribal laws and customs.

We believe that the carefully constructed approach to federal jurisdiction contained in this bill is consistent both with our goal to provide an effective and meaningful ICRA compliance process and with the principle that "federal courts must avoid undue or intrusive interference in reviewing tribal court procedures." *Smith* v.

Confederated Tribes of Warm Springs, 783 F.2d 1409, 1412, (9th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 465, 93 L.Ed. 2d 410. As in federal habeas corpus cases under section 203 of the Act, it is anticipated that "where the tribal court procedures under scrutiny differ significantly 'from those commonly employed in Anglo-Saxon society,' *Howlett* v. *Salish and Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir. 1976), courts [will] weigh 'the individual right to fair treatment' against 'the magnitude of the tribal interest (in employing those procedures)' to determine whether the procedures pass muster under the Act." *Randall* v. *Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988), *quoting Stands Over Bull* v. *Bureau of Indian Affairs*, 442 F.Supp. 360, 375 (D.Mont. 1977), *appeal dismissed*, 578 F.2d 799 (9th Cir. 1978).

Federal district court ICRA jurisdiction, coupled with the limitations built into the amendment, *e.g.*, exhaustion of tribal remedies, relief limited to equitable remedies and tribal incentives to resolve IRCA complaints locally, balances legitimate tribal interests with a meaningful program to protect individual statutory rights. Access to federal courts reverts to the pre-*Santa Clara Pueblo* status quo and guarantees those the ICRA was enacted to protest an effective statutory enforcement forum.

We are informed by the Office of Management and Budget that the views expressed in this letter are in accord with the program of the President.

Sincerely,

/s/ Thomas Boyd
THOMAS M. BOYD
Acting Assistant Attorney General
Office of Legislative Affairs

U.S. Department of Justice
Civil Rights Division

[SEAL]

Office of the Assistant Attorney General
Washington, D.C. 20530

[Jun. 12, 1991]

Honorable Nicholas J. Spaeth
Attorney General
State of North Dakota
600 East Boulevard
State Capitol
Bismarck, North Dakota 58505

Re: *Indian Civil Rights Act Amendments*

Dear General Spaeth:

I am writing concerning our mutual interest in achieving full compliance with the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.*

For some time now both the Department of Justice and the Conference of Western Attorneys General have urged Congress to amend ICRA to provide federal courts with enforcement jurisdiction. Your resolutions of 1989 and 1990 and our letter to Senator Hatch of March 1, 1991, a copy of which is enclosed, point out serious non-compliance with the ICRA on the part of some tribal governments.

I am pleased to report that I met recently with Senator Hatch who said he shares our concern. Furthermore, he believes hearings on this important issue are both timely and appropriate. I am certain that Senator Hatch would welcome a letter from you and other western Attorneys General, concerning the need for full ICRA

enforcement. Accordingly, I would encourage you to write to him with your thoughts on how this may be achieved and your previous call for ICRA oversight hearings.

If I can be of any assistance, please do not hesitate to write or call me on (202) 514-2151.

Sincerely,

/s/ John R. Dunne
JOHN R. DUNNE
Assistant Attorney General
Civil Rights Division

Enclosure

APPENDIX H

CONGRESSIONAL RECORD—SENATE

Proceedings of the 101st Cong., 1 Session Vol. 135 Washington, Monday, March 6, 1989, No. 23.

By Mr. HATCH:

S. 517. A bill to provide Federal court authority to enforce rights secured by the Indian Civil Rights Act of 1968, and for other purposes; to the Committee on the Judiciary.

INDIAN CIVIL RIGHTS ACT AMENDMENTS

Mr. HATCH. Mr. President, I rise today to introduce the Indian Civil Rights Act Amendments of 1989.

TRIBAL GOVERNMENTS AND SOVEREIGNTY

* * * *

While the decisions of these tribal governments reflect the history, culture, religious convictions, and shared values of the tribal leaders and members, the process of tribal government is largely based on a constitutional model. Most tribes, for example, are constitutional in nature and organized pursuant to the Indian Reorganization Act—Wheeler-Howard Act—of 1934. Very few, the Southwest Pueblos are the notable exception, have religious or other traditional forms of Indian governments.

Constitutionally, tribal governments differ from most State and Federal governments. Some of the fundamental checks and balances existing within the Federal and State constitutional framework, for example, are not present at the tribal level. Real power in many tribal governments rests with the tribal council or legislative branch. Tribal councils pass the ordinances, resolutions and other processes which create tribal law. Through

standing committees in such areas as social welfare, law enforcement, or the judiciary, tribal councils then perform executive management, and implementation functions as well. The tribal councils often micromanage tribal programs and their function is substantially different from the more general oversight role performed by non-Indian legislative bodies.

Separation of powers into coequal branches of government in order that one may check the potential abuse of another is not a concept well-established in tribal governments. As a result, tribal governments may lack pluralism, respond more to majority concerns, and ignore minority interests.

In that context, tribal courts exist in only about one-half of the tribal governments. Where courts do exist, they are often a creation of the tribal council and, therefore, subject to and dependent on the council. Rarely do tribal courts exist constitutionally as a separate coequal branch of the tribal government. As a consequence, tribal courts may lack the powers to review tribal council actions, may be otherwise limited jurisdictionally, and may lack independence from the tribal council or tribal chairman.

Tribal governments, because they are neither Federal nor State instruments and because they predate the Constitution, are not restricted by Federal or State constitutional authority. Similarly, tribal governments are not bound by many Federal civil rights statutes including, for example, civil actions for deprivations of statutory or constitutional rights, 42 U.S.C. section 1983, the Voting Rights Act, 42 U.S.C. 1973, and laws prohibiting discrimination in employment, 42 U.S.C. 2000e-1.

THE 1968 INDIAN CIVIL RIGHTS ACT

However, Congress has plenary power over Indian matters. This exceptionally broad congressional authority is

found in article I, section 8, clause 3 of the Constitution, which gives Congress the power to "regulate commerce * * * with Indian tribes." In an exercise of its plenary power, the Senate Judiciary Subcommittee on Civil and Constitutional Rights heard complaints of civil rights violations by tribal governments. The subcommittees held hearings from 1960-1967 and documented widespread civil rights abuses on the part of tribal governments generally.

This record of civil rights abuses by tribes led to the enactment, over objection by tribes, of the Indian Civil Rights Act, as title II of the Civil Rights Act of 1968. The Act applies substantial portions of the Constitution's Bill of Rights and the 14th amendment to tribal government in much the same way that the Federal Bill of Rights restricts the Federal Government. As set out in title II, section 202 of the Indian Civil Rights Act:

* * * *

In deference to Indian tribal values, however, certain constitutional provisions, including the first amendment's prohibition against establishing religions, were omitted. Other concessions were made to Indian tribal governments and values. Tribes, for example, need not provide indigent criminal defendants with counsel. Much of the concern, and the ultimate concessions, centered on the financial impact of granting broad rights to individuals who come in contact with tribal governments.

EARLY ENFORCEMENT

For 10 years, from 1968 and 1978, the Indian Civil Rights Act was routinely enforced in both tribal and Federal courts. Each Federal appellate court which considered the Indian Civil Rights Act; that is, the Fourth, Eighth, Ninth, and Tenth Circuit Courts, found the act within Congress' power and inferred a private right of action in Federal court to enforce the act's provisions.

The number of reported Federal district court cases between 1968 and 1978 was substantially less than 100 or roughly 10 per year nationwide. One way to read such a statistic is to see the positive impact or value that possible Federal civil rights enforcement has on encouraging tribal compliance with the act. Certainly the tribal exhaustion requirement which Federal courts routinely read into the act tended to resolve many issues at the tribal level without the need for Federal court action.

To be sure, there is little, if any, evidence that between 1968 and 1978 tribal governments suffered substantially as a result of the limited Federal court Indian Civil Rights Act enforcement. For example, there is no evidence that any tribe was forced to terminate its tribal government functions or became insolvent as a result of the act. In fact, there is some evidence that the act had a salutary effect on tribal government by, among other things, checking tribal abuse, providing for a more pluralistic tribal government, and encouraging nonreservation capital investment.

For the most part, pre-1978 Indian Civil Rights Act decisions enforced the act within the context or framework of existing tribal traditions, customs, and values. In due process cases, for example, Federal courts looked to tribal law or customs for a definition of what process was due. Tribal defense in equal protection litigation often relied on tribal "rational basis"; that is tribal law or custom, not available to non-Indian governments.

TERMINATION OF FEDERAL COURT REVIEW OF INDIAN CIVIL RIGHTS ACT ABUSES

Federal court review came to an end in 1978 with the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). There, the Supreme Court said the Indian Civil Rights Act does not provide for a waiver of sovereign immunity and, further, the acts fails to provide a private right of action for individuals in

Federal court. The court found two distinct and "competing" purposes in the act: First, to protect individuals from tribal abuse of power; and second, to promote Indian self-government. Although the court found that Congress has the power to provide a Federal forum, it said to do so may limit tribal court power and, thereby, lessen or infringe on tribal sovereignty or self-government. Accordingly, the court reused to read in the Indian Civil Rights Act a right of action in Federal court which was not explicitly contained in the act. The court went on to warn the tribes, however, that if they were deficient in applying and enforcing the act, Congress may in the future provide for Federal relief.

CRITICISM OF THE LACK OF FEDERAL COURT REVIEW

Over the last few years, substantial criticism has been raised over the burden often placed on plaintiffs by the Santa Clara Pueblo decision. While some tribal governments have gone to great lengths to ensure enforcement of the Indian Civil Rights Act guarantees, such is not the case with all tribes. In a 1984 report by the Presidential Commission on Indian Reservation Economies, the commission attacked the fairness of some tribal government proceedings. In its report, the commission states:

> [Failure to adhere to a constitutional principle separating executive, legislative and judicial powers has had a detrimental effect on governmental functioning. For example, the failure to establish a clear separation of powers between the tribal courts, weakening their independence, and raising doubts about fairness and the rule of law. * * * Both Indians and non-Indians complain of political discrimination against them by tribal governments and tribal courts which are arms of tribal governments. Access to tribal physical resources, to the benefits of tribally

managed programs, and to tribal employment is considered to be unfair by many Indians. Decisions rendered by tribal courts, which are controlled by tribal councils, are also perceived to be unfair by Indians and non-Indians.

Similar criticism has also been raised by the Federal courts. In the case of *Shortbull v. Looking Elk*, 677 F.2d 645 (8th Cir. 1982), the 8th Circuit Court of Appeals reviewed a case in which the plaintiff claimed that he was wrongfully refused permission to run for tribal office by an action of the tribal council. In addressing the lack of protection for the plaintiff's rights under the Indian Civil Rights Act, the court stated:

> We must, however, express serious concern that Shortbull's rights under [Sec.] 1302 of the Indian Civil Rights Act (ICRA) may never be vindicated. Shortbull alleges that the tribal court, Chief Judge Red Shirt, ruled that he was entitled to run in the primary election because of the Tribal Council's January 24 resolution. It appears that because of this ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the Tribal Executive Committee, who quashed Judge Red Shirt's orders. Such actions raise serious questions under the Indian Civil Rights Act, but because the Supreme Court determined in *Santa Clara Pueblo* that there is no private right of action under the IRCA. Shortbull has no remedy. * * *
>
> We are thus presented with a situation in which Shortbull has no remedy within the tribal machinery nor with the tribal officials in whose election he cannot participate [citations omitted], unless and until Congress provides otherwise. [Citing *Santa Clara Pueblo.*] We questioned whether such a result is justified on the grounds of maintaining tribal autonomy and self-government: it frustrates the ICRA's purpose of "protect[ing] individual Indians from the arbitrary and unjust actions of tribal govern-

ments," and in this case it renders the rights provided by ICRA meaningless.

The Tenth Circuit Court of Appeals also attacked the current enforcement situation in the case of *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). In one of the few non-habeas corpus Indian Civil Rights Act cases to provide a federal forum by narrowly construing the Santa Clara Pueblo decision, the court provides some useful insights with reference to the facts and the resulting lack of fairness in that case:

> Plaintiffs Cook, who are non-Indians, had owned the 160-acre tract for about ten years and had lived there. They decided to build a guest lodge for hunting, and consulted the superintendent of the reservation about the matter. He advised them that projects of this type were encouraged to provide employment. He also stated that there would be no access problem. A license to plaintiffs Cooks was issued for the business. The individuals then formed Dry Creek Lodge, Inc. to build the facilities. This was done with an SBA loan. The lodge was completed and opened, but the next day the tribes closed the road at the request of a nearby Indian family. . . .
>
> The [tribal Joint Business Council directed that access to the Dry Creek Lodge be prevented by the federal officers, and the [Indian family] were apparently to erect the barricade. With the road blocked the persons on the Dry Creek land could not get out and were for all practical purposes confined there until a federal court issued a temporary restraining order. Thereafter the plaintiffs sought a remedy with the tribal court, but were refused access to it. The judge indicated he could not incur the displeasure of the Council and that consent of the Council would be needed. 25 C.F.R. Sec. 11.22.

> The consent was not given. The state court cases were removed to the federal court. In the federal court the defendants urged that there was no remedy—no jurisdiction. * * * The Tribal Business Council according to the minutes, directed that the differences between the [Indian] family and the plaintiffs be settled by self-help, and this was done. The plaintiffs, however, did not respond the same way. The defendants argue here, as they did in the trial court, that the plaintiffs have no remedy. There is no forum where the dispute can be resolved and the personal property rights asserted by plaintiffs be considered. * * *
>
> The plaintiffs alleged that their personal and property rights under the Constitution had been violated by the defendants. A jury so found and awarded damages. There must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly manner. To hold that they have access to no court is to hold that they have no remedy. The self-help which was suggested to shut down plaintiffs' "business," according to the Council minutes, and which was carried out with the help of the federal police, does not appear to be a suitable device to determine constitutional rights.

In that case, even the dissenting judge acknowledged that dilemma when he stated:

> To me this is a most, disturbing case because of the result I feel compelled to reach. The jury found a violation of the plaintiffs' civil rights recognized by [section] 1302 of the Indian Civil Rights Act, under the most distressing circumstances. And yet it seems we must say that the doors are closed against any orderly redress for the wrongs. State and federal courts are barred by the immunity doctrine from hearing the claims and access was de-

> nied to the tribal court, as the majority opinion points out. * * *
>
> [T]hese damages claims are * * * barred * * * unless and until Congress provides otherwise.

Only recently, this criticism by the Federal courts of the status quo was reaffirmed by the U.S. District Court for the District of Montana in the case of Little Horn State Bank versus Crow Tribal Court. After a lengthy review of the facts in which the plaintiff was repeatedly denied his rights by the defendant, the Judge went on to state:

> This Court is well aware of the continued promotion of tribal self-government and self-determination. In National Farmers Union Ins. Co. v. Crow Tribe [citation omitted], the Supreme Court directed the federal district court to give tribal legal institutions the "proper respect" by staying its hand in order to allow the Tribal Court a "full opportunity to consider the issues before them." [Citation omitted.] This Court, in keeping with its obligation to uphold the law, will honor that directive.
>
> However, it has become extremely difficult to do so in the face of such decidedly egregious facts as are presented herein. Plaintiff has recognized the sovereignty of the Tribe and has valiantly tried to operate within the Tribal Court system, seeking its approval of a valid judgment entered in the courts of the State of Montana, and assistance in enforcing the same. The Crow Tribal Court, acting as a sort of "kangaroo court" has made no pretense of due process or judicial integrity. Plaintiff was met not only with bias and uncooperativeness, but with a blatantly arbitrary denial of any semblance of due process. The tribal judge's conduct makes a mockery of any orderly system of justice, and renders any attempt to deal with the Tribe in a professional and

> competent manner a farce. The Court seriously questions whether the conduct of the Tribal Court is befitting the title of a sovereign, and the respect and deference customarily accorded along with that status.
>
> It would appear that the Crow Tribal government changes judges at a whim, to the detriment of non-Indian litigants, and of the Tribe. As a result, the Tribal Court lacks any continuity and uniform precedent which is the foundation of our judicial system. While the tribal members enjoy the protection of their rights under both the United States Constitution and the ICRA, depending on the forum. It appears that non-Indians are not granted the same privilege of dual citizenship in Tribal Court. If the Crow Tribe wishes to earn the respect and cooperation of its non-Indian neighbors, it must do more to engender that respect and cooperation, not abuse those neighbors who attempt to work within its system.

Let me reiterate that these abuses that are cited by the courts are not necessarily occurring in all or even a majority of the tribal governments. Nevertheless, the situation was serious enough to warrant congresssional action in 1988, and it appears that at least with some tribes such is still the case.

THE NEED FOR LEGISLATION

The concerns of the courts that I have been quoting are further supported by an extensive record of the lack of Indian Civil Rights Act enforcement that is currently being compiled by the U.S. Civil Rights Commission. For the last couple of years, the Commission has been holding a series of hearings on this issue. While the Commission's report is not yet complete, the transcripts and hearing records contain many statements that further support the allegations of failure by some tribal governments to ade-

quately enforce the civil rights guaranteed to both tribal and nontribal reservation residents alike.

Because of the enforcement problems that have occurred since the Santa Clara Pueblo case, the time has now come to follow the Supreme Court's dictum and legislate a Federal court remedy. A review of post-Santa Clara Pueblo Federal and tribal case-law, existing Federal studies, news reports, and other available information, makes clear that rights secured by the Indian Civil Rights Act have been less than fully enforced.

In earlier testimony before the U.S. Civil Rights Commission, the Department of Justice provided some interesting statistics and background with respect to its involvement and monitoring of Indian Civil Rights Act enforcement. I would like to share some of that testimony with my colleagues at this point:

> In the 7 years prior to Santa Clara, the Department of Justice received about 230 complaints of ICRA violations on the part of tribal governments. ICRA complaints during this period accounted for just over 18% of all civil rights complaints involving Indians. Several of these matters were settled by informal discussion between the Department and the affected tribes. Others were not pursued because of non-ICRA commitments on [the part of the Department]. The Department did, however, participate in 6 federal civil lawsuits which raised ICRA issues, including 2 brought solely on ICRA claims. No cases have been brought subsequent to Santa Clara. Most complaints brought to the Department's attention pre-Santa Clara involved allegations of tribal election irregularities. Other alleged violations occurred in the area of tribal employment, law enforcement, i.e. police and court irregularities, and housing assignment policies.
>
> Since the Court's 1978 decision in Santa Clara, the Justice Department has received about 45 ICRA

complaints alleging violations of the civil rights of Indians by tribal governments. No action has been taken on any complaint and no effort has been made, post Santa Clara, to invoke the jurisdiction of the federal courts. Seventeen complaints allege tribal court irregularities including a failure to allow retained attorneys to appear in tribal court, a failure to permit defendants an opportunity to be heard and the failure to afford criminal defendants a trial by jury. Thirteen complaints allege flaws in the tribal election process including improper interference by the tribal council, fraud and malapportioned election districts. Six complaints allege improper tribal hiring practices including political interference and nepotism. Four complaints allege housing violations including noncompliance with tribal housing assignment policies, favoritism and improper interference by the tribal council. The remaining miscellaneous complaints range from an alleged failure to provide tribal benefits equally to all members (similar to the Santa Clara facts) to an allegation of unsanitary and inadequate tribal jail conditions.

The following incidents are representative of the more serious complaints received by the Department since Santa Clara and, to our knowledge, which have gone unreviewed by federal courts. On March 13, 1979 a tribal member was arrested for disorderly conduct by tribal officials. An investigation of the circumstances surrounding his arrest, trial and punishment revealed the following information. The victim was held without bail in pretrial confinement for 5 days. On March 18, 1979 he was transported from the jail and taken to a room containing tribal officials. All other persons were removed from the room. The victim was forced to kneel in front of the tribal officials. He was told that he was charged

with disorderly conduct and asked several questions concerning his arrest on March 13th. He was never informed of the statutory rights set out in the ICRA. After a time, a tribal official asked that a rawhide whip about 2 feet long be brought in the room. When it arrived, the official instructed a subordinate to whip the victim four times, which was done. The victim was sentenced to 30 additional days in jail and returned to jail without medical attention. Other information confirms that the victim's account is an accurate description of how trials are conducted at the tribe. Non-public proceedings, no representation by counsel, no notification of procedural rights and whippings are all customary in criminal proceedings.

A Southwest tribe is districted into several separate council districts. Federal courts have held that the due process clause of the ICRA requires that trial council districts comply with one person, one vote requirements. However, the 1982 election districts exceed the maximum permissible derivation by approximately 200-400% depending upon population base used. A recent redistricting has reduced that deviation to approximately 70%.

In a 1982 complaint, an attorney wrote [the Department] alleging that a tribe refused to permit him to represent his client. The attorney alleged that his client was required to present a case in tribal court while the attorney was present "but only as an observer". According to the attorney's account, when he spoke up on behalf of his client, members of the tribal council tried to have him "removed from the courtroom altogether." He concludes his letter with the observation that "[t]he tribal court system is a total mockery of justice at best and more realistically a fraud" on the tribal members. Subsequently the attorney was "removed" from the reservation by tribal law enforcement au-

> thorities. In a February 20, 1985 letter, a tribal member wrote to complain that she and others "have been cheated in tribal elections". She also complained that tribal members are "coerced into compliance thru[sic] fear of losing their jobs and our civil rights have been flagrantly violated." She told [the Department] that she "cannot be identified for fear of job reprisal". Finally, [the Department] received a September 6, 1985 letter from an Indian who requested our "help in protecting [tribal members] from our government". Following the submission of a recall petition, the tribal council went through the signatures systematically "giving people the choice of being suspended from employment or publicly apologizing for signing the Petition". The letter continues with the allegation that the "Council is threatening us * * * All we want is the right to vote and elect our leaders. We understand this is supposed to be a real right, but so far there is no avenue for enforcement.

In a recent letter from the justice Department to the U.S. Commission on Civil Rights, the Department provides a summary of complaints it has received since the Santa Clara Pueblo decision. Mr. President, I ask unanimous consent that a copy of that letter and the incident summary be included in the Record immediately following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HATCH, Mr. President, while abuse of rights by individual tribal officials has surfaced since Santa Clara Pueblo; for example, allegations that tribal judges fail to insist on proper standards prior to issuing search warrants, structural problems are also present and, arguably, more important.

Examples of structural Indian Civil Rights Act problems include the failure of tribal governments to insist

on independent judicial review or an equally effective Indian Civil Rights Act compliance procedure. Some tribal governments fail to create tribal courts or, where they do exist, extend to them the power of judicial review.

For example, recent news reports out of my home State of Utah indicate that last year a tribal judge on the Ute Indian Reservation was dismissed from his position by the reservation Business Committee when the judge found the committee in contempt of court for failure to pay more more than $500 million in back dividends to new tribal members. While the news articles are not detailed as to all of the specific facts of that case, they do point out that the tribal government has passed a new law prohibiting legal action against the tribe in tribal court. If that is the case, and I believe that it is, then given the Supreme Court ruling in Santa Clara Pueblo that Indian civil rights actions may not be brought in Federal courts, it would appear that at least on the Ute reservation there is no possibility of enforcing the 1968 Indian Civil Rights Act in cases involving the tribal government.

This situation and other complaints regarding lack of enforcement of the Indian Civil Rights Act warrant serious congressional action in the form of hearings. We must determine the scope of the problem and take corrective action in the form of legislation to ensure that individuals will have their civil rights enforced.

Efforts have been made to increase Federal funding and provide effective training programs for tribal systems. However, while appropriate funding and training levels are important, they will not resolve the Indian Civil Rights Act enforcement problems that do exist. The remedy lies with Federal court enforcement. Federal court enforcement, coupled with a requirement of exhaustion of tribal remedies and limited to equitable relief, will achieve the goal to providing an effective Indian Civil

Rights Act compliance program without unnecessarily limiting other legitimate tribal goals.

The bill that I am introducing today does just that. It provides for Federal court review and enforcement after an individual has exhausted his or her tribal remedies. The bill will also prohibit the defense of sovereign immunity in civil rights cases. It is a fair and balanced solution to ensure that all citizens, both Indian and non-Indian, enjoy basic civil rights.

* * * *

Mr. President, the bill that I am introducing today strikes a legitimate balance between the interests of the tribal governments in exercising their powers of self-government and the rights which Congress extended to individuals through the 1968 Indian Civil Rights Act. It was endorsed by the administration last year and I am reintroducing it in the same form. I would encourage my colleagues to carefully examine this issue and support this effort to protect the rights of all Americans.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

* * * *